CXW / avs 2 / 21 / 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.	Application 01-02-024 (Filed February 21, 2001)
Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.	Application 01-02-035 (Filed February 28, 2001)
Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.	Application 01-02-034 (Filed February 28, 2001)

ASSIGNED COMMISSIONER'S RULING IMPOSING A SANCTION AGAINST PACIFIC BELL TELEPHONE COMPANY FOR FAILURE TO COMPLY WITH DISCOVERY RULINGS

This ruling imposes an issue sanction against Pacific Bell Telephone Company (Pacific) for noncompliance with Administrative Law Judge (ALJ) rulings of August 13, 2001 and October 3, 2001, which required Pacific to produce cost data from SBC-affiliated states. Pacific is directed to produce the disputed material within 10 days from the date of this ruling, or risk further sanctions, including monetary penalties of up to $20,000 per day of non-compliance.

Background

During the course of this proceeding, AT&T Communications of California, Inc. (AT&T) and WorldCom, Inc. (WorldCom) (hereinafter jointly referred to as "Joint Applicants") submitted a data request to Pacific requesting models, spreadsheets and other documentation supporting various UNE costs that were either proposed to or adopted by regulators in Illinois and Michigan for SBC-affiliated companies, namely SBC-Ameritech. On August 13, ALJs Duda and Ryerson conducted a hearing to consider these requests and overruled Pacific's objections to production of this material on the grounds that the material was relevant to the proceeding. Pacific moved for reconsideration of this ruling, based on the claim that out-of-state cost data is not relevant to the issues in this proceeding. On October 3, ALJ Duda denied this motion on the grounds that the material was relevant because it involved information and cost methodologies currently advocated in other states by Pacific's parent, SBC, and

because Pacific has admitted it purchases major network components through SBC from common vendors and under SBC-wide purchasing arrangements.[1]

On October 12, Pacific filed an interlocutory appeal requesting that the Commission overturn the ruling of ALJs Duda and Ryerson and stay the ruling pending decision on the appeal. In its appeal, Pacific argues that the requested material does not belong to Pacific, was developed by Ameritech prior to Ameritech's merger with SBC, and is held by SBC-Ameritech. Essentially, Pacific asserts it does not have "control" over these SBC-Ameritech documents because SBC-Ameritech and Pacific are legally separate entities. Thus, Pacific argues it does not have to produce them. Pacific does not appeal the relevancy of this material.

To date, Pacific has not produced any of the requested documents that it was ordered to produce pursuant to the August 13 and October 3 ALJ rulings. Likewise, the Commission has not acted on Pacific's interlocutory appeal and has not granted a stay of the earlier ruling ordering Pacific to produce the documents.

Discussion

I am not persuaded to request that my colleagues entertain Pacific's appeal in this discovery matter. First, the Commission generally looks with disfavor on interlocutory appeals of ALJ rulings. (45 CPUC 2d 630. *See* also *Pacific Enterprises*, 79 CPUC 2d 343, 421.) As the Commission stated in *Pacific Enterprises*, the presiding officer must have the authority to rule on discovery motions and

[1] *See* Declaration of Mark R. Kamstra, filed 4/20/01, as an attachment to "Response of Pacific to ALJ's Ruling Consolidating Dockets for Limited Purpose and Setting Comment Schedule, and Response to Joint Applicants' Emergency Motion."

impose sanctions for discovery abuse. Without this authority, material evidence would remain undisclosed or unconscionable delay would occur as parties seek relief from the Commission. Under Commission Rule 65, the Commission may review evidentiary matters under two circumstances, either when considering the matter on its merits or when the presiding officer refers the matter to the Commission. In this case, the presiding officer did not refer the matter.

Second, I will not recommend that the Commission consider the matter on its own merits because I find that Pacific's interlocutory appeal lacks merit. The Commission generally refers to California's Code of Civil Procedure (CCP) for guidance with regard to discovery procedures.[2] The CCP and the similarly worded Federal Rules of Civil Procedure require a party to produce documents within its "possession, custody, or control."[3] Based on a review of cases involving a subsidiary's custody and control of documents held by parent or affiliate corporations, I disagree with Pacific's claim that it does not have custody or control over this out-of-state cost information.

A number of federal courts have found that a subsidiary can have control over its corporate parent's documents. The court's analysis focuses on "whether the intracorporate relationship establishes some legal right, authority, or ability to obtain the requested documents on demand." *Camden Iron*, 138 F.R.D. at 442. Evidence the courts have considered includes the degree of ownership and control the parent exercised over the subsidiary, whether the two entities

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[2] *See, e.g.*, P.U. Code section 1794 (the Commission or any party may depose witnesses pursuant to the Code of Civil Procedure and compel the production of documents).

[3] C.C.P. section 2031 (a)(1); F.R.C.P. 34(a). The term "control" is broadly construed. *See Camden Iron & Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991); *M.L.C., Inc. v. North American Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986).

operated as one, whether an agency relationship existed, and whether there was "demonstrated access to documents in the ordinary course of business." *Id. See also* 8A C.A. Wright & A.R. Miller, Federal Practice and Procedure, section 2210, at 399 (1994), and *Japan Halon Co., Ltd. V. Great Lakes Chemical Corp.,* 155 F.R.D. 626, 628 (N.D. Ind. 1993). A finding that the parent and subsidiary are "alter egos" of each other is not necessary to establish control over specific documents. *Camden Iron*, 138 F.R.D. at 442.

Similarly, courts have found that a subsidiary can have control over a fellow subsidiary's (*i.e.* "affiliate's" or "sister corporation's") documents. The same types of factors apply: commonality of ownership, the exchange or intermingling of directors, officers, and employees, exchange of documents in the ordinary course of business, benefit or involvement by the non-party affiliate in the transaction at issue, and involvement of the non-party in the litigation. *See Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998). As with the parent / subsidiary analysis above, the definition of "control" is not based on a finding of alter ego liability. *Id.*

Applying the same analysis as commonly used by the courts, Pacific does have a close relationship with SBC-Ameritech, SBC has exercised control over Pacific, and there is demonstrated access to SBC and SBC-Ameritech documents in the ordinary course of business. Indeed, it appears that the operations of Pacific and the SBC-Ameritech entities in Illinois and Michigan are very closely related and may in fact be intertwined. SBC is the parent company of both Pacific and the SBC-Ameritech entities operating in Michigan and Illinois. Many operations are centralized at the parent company level. SBC makes purchasing decisions for its LEC subsidiaries such as Pacific and Ameritech, and the LECs purchase from common vendors under the same contracts, including switching

contracts. The subsidiaries use and rely on common SBC employees, including in the area of costing. For instance, several of the declarants whose testimony Pacific has filed in this proceeding are SBC, not Pacific, employees.[4]

Pacific also appears to have access to the costing information of SBC and SBC-affiliates in the regular course of business. During the course of this proceeding, Pacific has complied with data requests and produced material from SBC such as business plans developed by SBC executives and SBC-wide switching contracts. In addition, Pacific has demonstrated it has access to documents of SBC-Ameritech because it has relied on the testimony of the same witness used by SBC-Ameritech in Illinois to support its positions in this proceeding. Specifically, Pacific has filed three declarations from William Palmer, who has filed testimony on behalf of Pacific Bell's sister company SBC-Ameritech in Illinois on the same switching cost study at issue here.[5] Finally, Pacific Bell has filed a motion in this proceeding to vacate the current schedule in this proceeding and has based this motion on the filing of cost information from its Texas affiliate in the Commission's Section 271 proceeding.[6]

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[4] *See* Declaration of Bradley T. Souther, an SBC Operations employee, filed 4/20/01; Declaration of Donald Palmer, an SBC Services employee, filed 4/20/01; Declaration of Thomas J. Makarewicz, an SBC Telecommunications employee, filed October 30, 2001; and Declaration of Mark Kamstra, an SBC Services employee, filed 4/20/01.

[5] *See* Pacific Bell's Response to the Motion of Joint Applicants for Interim Relief, Sept. 4, 2001; Pacific Bell's Comments on Joint Applicants' Interim Switching Pricing Proposal, Attachment E, Oct. 30, 2001; Pacific's Motion to Strike Portions of AT&T/Worldcom's November 9, 2001 Filing, Attachment A, Nov. 20, 2001.

[6] *See* Pacific's 10/19/01 "Motion to Vacate the Assigned Commissioner and ALJ Ruling of 9/28/01 as Moot," and Pacific's 10/19/01 "Addendum to Motion of Pacific Bell to Notify Parties of Discounted Switching UNE Prices" filed in R.93-04-003/I.93-04-002 ("Section 271 Proceeding").

Thus, Pacific has waived any argument that it does not have access to and / or control of documents of its affiliates and parent company by producing documents and witnesses of SBC and SBC-Ameritech in the course of this proceeding. It appears that Pacific is selectively seeking to exclude data from its Illinois and Michigan SBC-affiliated operations although it has already produced documents developed outside of Pacific by other SBC-affiliated entities in the course of this case.

Sanctions for Noncompliance with Discovery Rulings

I am deeply troubled by Pacific's blatant disregard for the rulings of the Presiding Officer, ALJ Duda, and the Commission's Law and Motion Judge, ALJ Ryerson. Pacific's non-compliance has deprived Joint Applicants of the benefit of reviewing material that was deemed relevant to the proceeding. Joint Applicants have argued that the Commission should adopt interim rates based on similarities in costs between Pacific's operations and SBC-Ameritech's operations in Illinois. Pacific's written comments clearly dispute that any similarity exists, yet Pacific has not produced the relevant Illinois cost information to support this position or provided Joint Applicants with the evidence to support Pacific's claims.

I find that Pacific's actions have prejudiced Joint Applicants in this proceeding by withholding evidence relevant to the issue of cost modeling and costs throughout the various states in which SBC operates. This evidence may have a bearing on costs in California. Joint Applicants have responded to Pacific's assertion that Illinois' costs are different than California's without the benefit of this material. Joint Applicants claim that permitting Pacific's actions would set the dangerous precedent of allowing an entity to hide information from the Commission by developing and maintaining it at one of its sister

companies or at its corporate headquarters. I agree. Pacific should not be able to pick and choose which information it will provide to the Commission.

Joint Applicants note that courts, when faced with discovery abuses and the refusal to produce certain materials, sanction such conduct by deeming certain facts admitted. They suggest that the Commission take similar action.[7] Again, I agree with Joint Applicants that a sanction against Pacific is appropriate.[8]

The Commission has specifically recognized that it has the power to impose discovery sanctions where litigants violate the CCP's discovery procedures. In the Commission's decision on the merger of Pacific Enterprises and Enova Corporation, the Commission affirmed the authority of the presiding officer, there an ALJ, to impose sanctions against a utility for failure to produce documents and stated:

> The presiding officer, of necessity, must have the authority to pass on discovery motions and impose sanctions for

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[7] *See* "Reply Comments of Joint Applicants Regarding Unbundled Switching Interim Proposal," November 9, 2001, p. 21.

[8] The Code of Civil Procedure allows the court to impose discovery sanctions if a party fails to obey an order compelling the production or inspection of documents. CCP Section 2031(n). The trial court "exercises discretion" in deciding which sanction to impose. *Kuhns v. State of California*, 8 Cal. App. 4th 982, 988 (1992). According to CCP section 2023, these sanctions may include "issue sanctions," under which (a) designated facts are deemed established in accordance with the claim of the party adversely affected by the discovery misuse and / or (b) the disobedient party is prohibited from supporting or opposing certain claims or defenses. The California courts have repeatedly upheld the imposition of issue sanctions. "Where a party has refused to supply information relevant to a particular claim, an order precluding that claim is an appropriate sanction." *Sauer v. Superior Court of San Diego County*, 195 Cal. App. 3d 213, 228 (1987) ("what is at stake here is the integrity of the discovery process…"). *See also Kuhns*, 8 Cal. App. 4th at 989.

> discovery abuse. To hold otherwise would impose a burden on the Commission that Rules 62 and 63 were designed to avoid. Further if sanctions could not be imposed by the presiding officer material evidence would remain undisclosed or unconscionable delay incurred as parties seek relief from the Commission.
> …
> It seems to us incongruous to grant to a presiding officer the authority to control the course of a hearing, rule on all motions, and recommend a decision to the full Commission, and yet deny that officer authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of a Commission hearing has no incentive to comply and often has every incentive to refuse to comply. Evidentiary sanctions for recalcitrance in discovery are part and parcel of the power to control a hearing and recommend a decision based on *all* relevant evidence.
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> *Pacific Enterprises*, D.98-03-073, 79 CPUC 2d 343, 421 and 422 (Mar. 26, 1998) (emphasis in original).

Therefore, after consultation with the Presiding Officer, ALJ Duda, I support her application of an issue sanction against Pacific wherein she will presume that the SBC-Ameritech cost information from Illinois and Michigan, which Pacific refuses to produce, supports the adoption of interim rates for unbundled loops and switching that are lower than the current rates. Although the time has now passed for consideration of the material in a decision on interim pricing, I affirm the earlier ALJ rulings and direct Pacific once again to provide the disputed material to Joint Applicants for their use in the remainder of this proceeding. I find that it is still appropriate to require Pacific to supply the material to Joint Applicants so as not to place Joint Applicants in a better

position than they would have been in if discovery had been obtained in the first place.[9] In other words, because of the possibility that the disputed material may not ultimately support Joint Applicants' claims for a lower UNE rate, the material should be available for consideration in the next phase of this case. If Pacific fails to produce the material, within 10 days from the date of this ruling, it will risk application of further sanctions in subsequent orders in this proceeding and monetary penalties of up to $20,000 per day for each day of non-compliance.

Therefore, **IT IS RULED** that:

1. The Presiding Officer shall presume that the SBC-Ameritech cost information from Illinois and Michigan, which Pacific refuses to produce, supports the adoption of interim rates for unbundled loops and switching that are lower than the current rates.

2. Pacific shall produce the disputed material within 10 days from the date of this ruling or risk further sanctions in this proceeding.

Dated February 21, 2002, at San Francisco, California.

/s/ Carl Wood
Carl Wood

[9] An issue sanction "should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause." *Sauer*, 195 Cal. App. 3d at 228.

Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Ruling Imposing Sanctions on Pacific Bell Telephone Company for Failure to Comply with Discovery Rulings on all parties of record in this proceeding or their attorneys of record.

Dated February 21, 2002, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

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